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No. 85-5404

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

TERRY B. ALLEN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The
Illinois Supreme Court

MOTION FOR LEAVE TO FILE AND BRIEF FOR EDWIN F. MANDEL LEGAL AID CLINIC AS AMICUS CURIAE

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JANUARY 10, 1986

The Edwin F. Mandel Legal Aid Clinic of the University of Chicago Law School hereby respectfully moves for leave to file the attached brief as amicus curiae in this case. The consent of the attorney for the

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

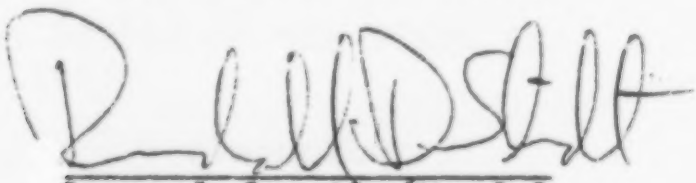
Petitioner has been obtained. The consent of the attorney for the Respondent was requested but refused.

The interest of the Mandel Legal Aid Clinic in this case arises from the fact that it has represented and will continue to represent persons confined under the Illinois Sexually Dangerous Persons Act, Ill. Rev. Stat., ch. 38, § 105-1.01, et seq., which is the subject of this case. Specifically, the Mandel Legal Aid Clinic represented the plaintiff in Stachulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975), and a class, consisting of all person in custody under the Illinois Sexually Dangerous Persons Act, in Morgan v. Sielaff, 540 F.2d 268 (7th Cir. 1977), both of which may be overruled by an adverse decision of this Court.

In the instant case neither party has thus far argued what standard(s) should be used to determine

whether a case is criminal for purposes of the Fifth Amendment privilege against self-incrimination. In the attached brief the Mandel Clinic will argue that this Court has established such a standard and will apply it to the facts of this case. If this argument is accepted, it would dispose of this case.

Respectfully submitted,



Counsel for the Mandel
Legal Aid Clinic

Date: January 10, 1986

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With the written consent of the Petitioner and upon motion for leave to file brief as Amicus Curiae, the Mandel Legal Aid Clinic submits this brief as Amicus Curiae in support of Petitioner, Terry B. Allen.

STATEMENT OF INTEREST

The Edwin F. Mandel Legal Aid Clinic of the University of Chicago Law School, in existence since 1959, is dedicated to protecting against and remedying deprivations of constitutionally protected rights. The Clinic regularly represents persons who have been found sexually dangerous under the Illinois Sexually Dangerous

Persons Act, and other mentally ill persons confined in prisons and mental hospitals under Illinois law. Denial of the privilege against self-incrimination in proceedings under the Illinois Sexually Dangerous Persons Act would seriously affect the rights of all classes of mentally ill persons confined in Illinois.

SUMMARY OF ARGUMENT

Persons accused of being sexually dangerous under the Illinois Sexually Dangerous Persons (hereinafter, "SDP") Act are entitled to the Fifth Amendment privilege against self-incrimination. The Fifth Amendment privilege against self-incrimination applies to any criminal case. In In Re Gault, 387 U.S. 1 (1967), this Court adopted a four-part test to determine whether a proceeding is a criminal case within the meaning of the Fifth Amendment. The four factors adopted in Gault include: (1) the maximum length of confinement; (2) the nature of confinement; (3) the stigmatizing effect of the classification; and (4) the nature of the adjudicatory process. This Court applied this test in Gault and held that delinquency proceedings were criminal cases within the meaning of the Fifth Amendment.

Persons determined to be sexually dangerous under the SDP Act are confined indefinitely in a maximum security state penitentiary and are severely stigmatized. Moreover, the adjudicatory proceedings are criminal in nature since they require the finder of fact to determine that the defendant has committed a criminal act, and since they provide such typically criminal procedures as the right to jury trial, the right to appointed counsel and the requirement of proof beyond a reasonable doubt. Therefore, under the four-part Gault test, this Court should hold that persons alleged to be sexually dangerous are entitled to the protection of the Fifth Amendment privilege against self-incrimination.

ARGUMENT

I. THE PRIVILEGE AGAINST SELF-INCRIMINATION APPLIES IN ILLINOIS SEXUALLY DANGEROUS PERSONS PROCEEDINGS UNDER THE FOUR-PART GAULT TEST.

One of the questions presented for review in this case is whether the Fifth Amendment privilege against self-incrimination applies to proceedings under the Illinois SDP Act. Ill. Rev. Stat., 1983, ch. 38, § 105-1.01 et seq. The Fifth Amendment expressly states that the privilege against self-incrimination applies to "any criminal case." The Illinois Supreme Court, however, held that the privilege does not apply to SDP proceedings because such proceedings are not criminal cases within the meaning of the Fifth Amendment. People v. Allen, 107 Ill.2d 91, 99-101 (1985). Under that holding, persons accused of being sexually dangerous may be compelled to provide

testimony that will be used to determine whether they can be confined indefinitely in a maximum security state penitentiary. People v. Allen, 107 Ill.2d at 103-104.

In In Re Gault, 387 U.S. 1 (1967), this Court adopted a four-part test in order to determine whether delinquency proceedings were criminal cases within the meaning of the Fifth Amendment privilege against self-incrimination. Application of the test adopted in Gault, will demonstrate that proceedings under the SDP Act are also criminal cases within the meaning of the Fifth Amendment. Thus, this Court should hold that the Fifth Amendment privilege against self-incrimination applies to SDP proceedings and that persons accused of being sexually dangerous cannot be compelled to provide testimony that will be used to determine whether they are SDPs.

A. The Four Factors Considered By This Court in Gault Were: (1) The Maximum Length of Confinement; (2) The Nature of Confinement; (3) The Stigmatizing Effect of the Classification; and, (4) The Nature of the Adjudicatory Process.

In Gault, this Court identified a four-part test in order to determine whether delinquency proceedings resulting in loss of liberty were criminal cases within the meaning of the Fifth Amendment.[1/] The four factors the Court identified were: (1) the maximum length of confinement; (2) the nature of confinement; (3) the stigmatizing

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[1/] This Court has used other tests when liberty is not at stake, United States v. Ward, 448 U.S. 242, 251-254 (1980), and when constitutional guarantees other than the privilege against self-incrimination are involved. Middendorf v. Henry, 425 U.S. 25, 33-42 (1976). However, this Court has consistently held that the meaning of "criminal case" under the Fifth Amendment is broader than similar usages in other constitutional provisions. Ward, 448 U.S. at 253; United States v. Regan, 232 U.S. 37, 50 (1914).

effect of the classification; and (4) the nature of the adjudicatory process. Gault, 387 U.S. at 12-59. In the Gault case itself, this Court applied the four-part test and held that: "[j]uvenile proceedings to determine 'delinquency,' which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination." 307 U.S. at 49.

Under the first Gault factor, maximum length of confinement, this Court determined that the delinquency proceedings in Gault were criminal in nature because a juvenile could be confined "for a maximum of six years." Gault, 307 U.S. at 29. An adult committing the same offense could not be held for more than two months. Thus, the criminal nature of the proceeding was magnified by the disparity in the possible

length of confinement. Gault, 307 U.S. at 24.

Under the second factor, nature of confinement, this Court determined that even though juveniles were sent to industrial schools, instead of prisons, such a distinction was of "no constitutional consequence" since industrial schools are "institutions of confinement in which the child is incarcerated for a greater or lesser time." Gault, 387 U.S. at 27. Moreover, this Court determined that delinquency proceedings were criminal in nature because there was no assurance that a juvenile would "be kept in separate institutions apart from adult 'criminals'" or that he "would remain outside of the reach of the adult courts as a consequence of the offense for which he [was] taken into custody." Gault, 387 U.S. at 51.

The first two factors of the Gault test were also applied in Schall v. Martin, ___ U.S. ___, 104 S.Ct. 2403 (1984), to determine whether pretrial detention of an accused delinquent was punishment under the due process clause of the Fourteenth Amendment. In Schall, this Court determined that such detention was not punishment because (1) the maximum length of a pretrial detainee's confinement, 17 days, was short and (2) the nature of the confinement was not punitive since the detainees were placed in a halfway house without locks or bars, rather than a prison or lockup holding adult criminals. 104 S.Ct. at 2413.

Under the third factor, the stigmatizing effect of the classification, this Court determined, in Gault, that delinquency proceedings were criminal in nature because the

term "delinquent" involved "only slightly less stigma than the term 'criminal' applied to adults." Gault, 387 U.S. at 24.

This Court has applied the first three Gault test factors in two other cases. In In Re Winship, 397 U.S. 358 (1970), this Court determined that the state must establish that a child is a delinquent by proof beyond a reasonable doubt under the due process clause of the Fourteenth Amendment because a "proceeding where the issue is whether the child will be found to be 'delinquent'and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." 397 U.S. at 367. The first three Gault factors were also applied by this Court in Addington v. Texas, 441 U.S. 418, 427-431 (1979), to determine whether a state must establish that a person is mentally ill and dangerous by

proof beyond a reasonable doubt in routine civil commitment proceedings.

Finally, under the fourth factor, the nature of the adjudicatory process, this court determined, in Gault, that delinquency proceedings were criminal in nature because a child had to commit an act violating state law in order to be found delinquent. Gault, 387 U.S. at 8. Thus, this Court determined that a finding of deliquency is little different from a conviction under a penal statute. 387 U.S. at 28-29.

This factor was also applied by this Court in United States v. Ward, 475 U.S. 242 (1980). In Ward, the Court determined that a statute assessing a financial penalty was not a criminal case within the meaning of the privilege against self-incrimination clause of the Fifth Amendment.

This Court did, however, state that respondent's claim to the contrary was aided by the fact that "the behavior to which the penalty applies is already a crime." 425 U.S. at 249-50.

In Gault, this Court also relied upon the fact that the nature of the delinquency proceeding was adversarial since neither the juvenile court judge nor the probation officer could be an advocate for the child while at the same time testifying against him or deciding whether to send him to a state institution. 387 U.S. at 36. Thus, based on the four factors mentioned above, this court, in Gault, held that delinquency proceedings were criminal cases within the meaning of the Fifth Amendment.

B. SDP Proceedings Are Criminal Cases Under the Gault Test.

A person must be charged with and found to have committed a criminal offense in order to be found sexually dangerous. A person found sexually dangerous is then indefinitely incarcerated in a cell in the psychiatric division of a maximum security penitentiary. Therefore, SDP proceedings must be regarded as criminal cases within the meaning of the Fifth Amendment under the Gault test.

The first factor of the Gault test is the maximum length of confinement. In United States ex rel. Stachulak v. Coughlin, 520 F.2d 931, 937 (7th Cir. 1975), the Seventh Circuit Court of Appeals relied on this factor to determine that the "reasonable-doubt standard of proof" should apply

in SDP proceedings. Thus, the Seventh Circuit held that:

> [T]he loss of liberty is as great [in a SDP proceeding], if not greater, than the loss in Winship [and Gault]. The violator of the criminal law -- be he an adult or juvenile -- is imprisoned, if at all, in almost all cases for a definite term. The person found to be sexually dangerous is committed for an indeterminate period ... .

Stachulak, 520 F.2d at 935-936. The criminal nature of an SDP proceeding is magnified by the fact that an SDP can be held far longer than a person convicted of committing the same unlawful act. Stachulak, 520 F.2d at 936 n.4. Maximum length of confinement under the SDP Act is also much longer than the 17 day period that this Court considered non-punitive in Schall.

Under the second factor of the Gault test, the nature of confinement, SDP proceedings are also more criminal than delinquency proceedings. For

instance, delinquents are committed to industrial schools or receiving homes, Gault, 387 U.S. at 27, while Petitioner and other SDPs are committed to the custody of the Illinois Director of Corrections and confined at "the Psychiatric Division of the Illinois State Penetentiary at Menard, a maximum-security penal institution." Stachulak, 520 F.2d at 932-33, 936 n.4. In addition to SDPs, the Psychiatric Division at Menard houses inmates who were convicted of sexual offenses and other mentally ill prisoners. SDPs are provided the same treatment services as convicted sex offenders and are accorded the same services, privileges and rights as "other inmates incarcerated at [the Menard] facility." Appendix A-1 to A-3. All of the residents of the Psychiatric Division are housed in single occupancy, maximum security cells. Appendix C-2 (A

photo of the cells is provided in Appendix B. Appendix B-1). Thus, the conditions of confinement under the SDP Act are much more criminal than in Gault or Schall where none of the juveniles were placed in cells or housed with persons convicted of offenses.

Additionally, SDPs are committed to the custody of the Director of the Department of Corrections. Ill. Rev. Stat., 1983, ch. 38, § 105-8. All other persons who the state claims they are confining for treatment are placed in the custody of the Director of the Department of Mental Health. See e.g., Ill. Rev. Stat., 1983, ch. 38, § 1005-2-4(a) (committed insanity acquittees); Ill. Rev. Stat., 1983, ch. 38, § 104-17(b) (persons committed because they are unfit to stand trial); Ill. Rev. Stat., 1983, ch. 91 1/2, §§ 1-100 et seq. (all other civil patients).

On the other hand, the Department of Corrections has custody only over those convicted of crimes, juveniles found delinquent under the Juvenile Court Code and SDPs. Thus, SDPs are treated like criminals, not like civil patients who are confined for treatment.

The third Gault factor, stigma, was also relied on by the Seventh Circuit Court of Appeals in Stachulak. In Stachulak the Seventh Circuit held that with respect to stigma, SDP proceedings represent an "a fortiori case." 570 F.2d at 936. The effect of the label 'SDP' is more stigmatizing than the label 'delinquent' because a finding of sexual dangerousness not only signifies that Petitioner committed a criminal act, but is also "more damning than a finding of juvenile delinquency." Stachulak, 520 F.2d at 936. Moreover, unlike

delinquency proceedings, SDP proceedings are not confidential. Stachulak, 520 F.2d at 936.

Finally, the fourth Gault factor, the nature of the adjudicatory process, also demonstrates that SDP proceedings like delinquency proceedings, are criminal. That is because, under Allen, 107 Ill.2d at 105, a person cannot be found sexually dangerous unless he has committed one act of or attempt at sexual assault or sexual molestation, both of which are crimes under Illinois law. Ill. Rev. Stat., 1983, ch. 38, § 11-1 et seq. Likewise, in juvenile delinquency proceedings, a child cannot be found delinquent, unless he has committed a criminal act. Ill. Rev. Stat., 1983, ch. 37, § 702-2.

In addition, a person cannot be found sexually dangerous unless actually charged with a criminal

offense. Ill. Rev. Stat., 1983, ch. 38, § 105-3. Thus, the punitive powers of the state are implicated in that the act triggering confinement violates penal law and actual criminal charges are brought. In Stachulak, the Seventh Circuit stated that since the SDP Act is an alternative to criminal prosecution, it is also in a very real sense a penal measure. 520 F.2d at 936 n.5.

The process in a sexually dangerous person proceeding is also more criminal in nature than a delinquency proceeding. For example, a petition accusing a person of being sexually dangerous must be filed in the same proceeding where the person stands charged with the criminal offense. Ill. Rev. Stat., 1983, ch. 38, § 105-3. In contrast, delinquency proceedings are separate from proceedings where criminal charges may be

brought. However, under the SDP Act, the same judge that would hear the criminal charge determines whether the accused is sexually dangerous. The SDP Act and the laws governing criminal trials are also both part of the Illinois Code of Criminal Procedure. Delinquency proceedings, which are part of the Juvenile Court Code, are not. SDP procedures are also criminal cases under the Fifth Amendment because they are adversarial in nature.

SDPs have the statutory right to counsel, trial by jury, and a reasonable-doubt standard of proof. Ill. Rev. Stat., 1983, ch. 38, § 105-301. Thus, SDP proceedings are criminal cases under the Gault test, and the privilege against self-incrimination should apply.

III. Conclusion

For the reasons mentioned above, this Court should reverse that part of the Illinois Supreme Court's decision holding that a person accused of being a SDP cannot refuse to answers questions even though his answer will be used to demonstrate that he is a SDP. This brief offers no opinion on whether psychiatists must give Miranda warnings before examining SDPs or whether Petitioner waived his privilege in this case.

Respectfully submitted,

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APPENDICES TO BRIEF OF EDWIN F. MANDEL LEGAL AID CLINIC AS AMICUS CURIAE

APPENDIX A

SEX OFFENDERS' TREATMENT PROGRAM

A formalized treatment program at Menard Psychiatric Center for sex offenders was initiated early in 1971 in response to the need for such an activity for those inmates committed to the Department of Corrections under the Sexually Dangerous Person's Act. This treatment program was later expanded to include inmates who either were convicted of a sexual offense or had a documented history of sexually offending and wished to volunteer to participate in a sex offender treatment program.

For technical purposes, given the unique legal situation of the Sexually Dangerous Person (SDP), the sex offender treatment program has been divided into two groups, SDPs and Volunteer Sex Offenders (VSOs). However, for treatment pur-

poses, both groups are provided the same services composed of a combination of Milieu Therapy, Time-Limited Supportive Individual Therapy, Family Therapy where possible and appropriate, Group Therapy, Didactic Therapeutic Experiences, and other relevant therapeutic activities. Such activities may include Educational and Vocational programming and Leisure Time Therapy depending upon the needs of the inmate.

The direction and supervision of all treatment services for SDPs and VSOs rests primarily in the hands of assigned Clinical Services staff in conjunction with staff psychiatrist(s) who together form the core of two treatment teams, one each for SDPs and VSOs. Other staff members from Menard Psychiatric Center are assigned to one or both of these two treatment teams on an as needed basis for the purpose of assisting in evaluating,

planning, and implementing treatment activities.

All participants in the Menard Psychiatric Center Sex Offender Treatment Program are accorded the same services, privileges, and rights as any other inmate who is incarcerated at this facility. The primary differences between participants in the Sex Offender Treatment Program and other inmates at Menard Psychiatric Center are that by Departmental policy, all SDPs are incarcerated at Menard Psychiatric Center, and by Institutional policy, the committing court, State's Attorney, and the lawyer of all SDPs receive regular evaluative reports, SDPs may only be released by their committing court, and VSOs are permitted to engage in the program contigent upon their demonstrating suitability as a candidate for treatment and progress in treatment.

In addition, all participants in the Sex Offender Treatment Program are fully informed as to the risks of therapy, the limits of confidentiality in a correctional psychiatric center (including the legal mandate for Menard Psychiatric Center to report known or suspected incidents of abuse or neglect to the Illinois Department of Children and Family Services), management of clinical records per Administrative and Institutional Directives, and in the case of VSOs, the requirement that they engage in psychological testing and clinical assessments and observations in order to be both considered for and maintained in the Sex Offender Treatment Program.

As is their legal right, SDPs may refuse treatment, and both VSOs

and SDPs may choose at any time to voluntarily stop participating in the Sex Offender Treatment Program.

APPENDIX B

APPENDIX C

STATE OF ILLINOIS)
)SS
COUNTY OF COOK)

AFFIDAVIT

Mark Heyrman, being first duly sworn on oath, states as follows:

1. that he is an attorney employed by the Mandel Legal Aid Clinic of the University of Chicago Law School;

2. that on December 17, 1983 he made a request to obtain certain documents from the Illinois Department of Corrections (DOC) pursuant to the Illinois Freedom of Information Act;

3. that in response to a request for documents describing the DOC programs for persons committed under the Illinois Sexually Dangerous Persons Act, on January 10, 1986 he received from DOC the document attached as Appendix A;

4. that in response to a request for photographs of the Menard Psychiatric Center, he received from DOC the photograph attached as Appendix B;

5. that he has personally visited Menard Psychiatric Center on several occasions;

6. that Appendix B accurately reflects the fact that all of the inmates at the Menard Psychiatric Center are housed in ordinary prison cells, such as those typically provided for persons convicted of crimes in Illinois and other states.

Mark Heyrman

Subscribed and Sworn
to before me this 10th
day of January, 1986.

Notary Public